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In the Supreme Court of the United States

OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC., PETITIONER,

v.

TOWN OF HARRISON, *ET AL.*, RESPONDENTS.

On Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF THE CHRISTIAN LEGAL SOCIETY, THE COALITION FOR CHRISTIAN COLLEGES & UNIVERSITIES, WORLD RELIEF, THE INTERNATIONAL UNION OF GOSPEL MISSIONS, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS and THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state statute denying property tax exemption to nonprofit entities who principally serve non-residents violates the Commerce Clause by impermissibly discriminating against entities and individuals who transact in interstate commerce.

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INTEREST OF THE *AMICI CURIAE*

Amicus curiae **Coalition for Christian Colleges & Universities ("CCCU")**, founded in 1976, is a professional association of over 90 Christian academic institutions

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*/ Consents to the filing of this brief have been lodged with the clerk.

representing over 40 different religious traditions and denominations in over 30 states. CCCU member schools enroll over 150,000 students each year. CCCU coordinates professional development opportunities for administrators and faculty and administers five off-campus student programs. A critical mission of CCCU is to provide public advocacy for Christ-centered higher education. On behalf of its members, CCCU has a keen interest in this case. The vast majority of CCCU members and affiliates serve large proportions of students from all over the United States and all over the world. A ruling upholding Maine's statute would enable the home states of CCCU's members to threaten the tax exemption (and thus the mission) of these institutions. Moreover, it would threaten the rights of students everywhere to seek a religious education at a private, nonprofit college or university.

Amicus curiae **World Relief**, headquartered in Carol Stream, Illinois, is an overseas relief agency sponsored by *amicus* National Association of Evangelicals and supported through evangelical churches. World Relief ministers to the world's needy through emergency relief in times of war and natural disaster, and through rehabilitative and development programs like refugee resettlement. Most of its activities occur outside Illinois and most of the funds raised are spent overseas in direct assistance programs or aid. If Illinois were permitted to target charitable groups whose focus was to aid others who -- by definition -- were outside the state, World Relief and other international aid agencies would be at risk.

Amicus curiae **International Union of Gospel Missions ("IUGM")**, founded in 1913, is an association of 240 Christian inner city rescue missions and ministries in the United States that feed and house the homeless and offer Christian charity and rehabilitation. Last year, IUGM members served 26,551,000 meals to the homeless and housed 9,581,000 men, women and children in their mission shelters. Each day over 9,800 people take part in rehabilitation programs, jail and prison ministries and an array of other outreaches to the poor and needy. The first member mission in the United States was the New York City Rescue Mission, founded in 1872. IUGM programs have always been evangelical in their outreach, and Good Samaritan in their nature.

The various missions operated at IUGM members' headquarters care for local residents and non-residents without prejudice. Many served have no legal address at all because they have lived on the streets for a long period of time. These missions would not be able to prove such clients were local residents.

Many missions have rehabilitation centers and camps away from the cities and adjoining states. It has long been a tradition to "get people out of the cities" for health, rehabilitation and spiritual purposes. Also, some member ministries are rural rehabilitation facilities that have historically accepted people from cities in a multistate region due to the fact that similar services were not available in their home states. Two of these facilities are America's Keswick's Colony of Mercy (founded 1903) in Whiting, New Jersey and Homes of Grace (founded 1965) in Van Cleave, Mississippi. These programs accept people from cities like Philadelphia, New York and New Orleans, and help them to become able providers for their families and responsible taxpayers. In almost all cases, the funds for these programs are private, raised mostly through donations.

Member missions such as Goodwill Home and Missions of Newark, New Jersey (Camp in New York); Reno-Sparks (Nevada) Rescue Mission (rehabilitation facility in California); Central Union Mission of Washington, D.C. (children's camp in Maryland); and Boston (Massachusetts) Rescue Mission (farm in New Hampshire) all have facilities in other states and would be at risk under the Maine statute. All of these facilities buy materials locally, as well as hire

local people to operate their programs and maintain their facilities.[1/]

Amicus curiae **Southern Baptist Convention ("SBC")** is the nation's largest Protestant denomination, with over 39,900 local churches and 16.5 million members. **Christian Life Commission ("CLC")** is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years regarding the primacy of the principle of religious liberty as contained in the Religion Clauses of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases such as this case.

SBC is headquartered in Nashville, Tennessee, where it owns substantial improved real estate presently exempt from property taxation. Its mission is carried out with contributions from member churches across the United States. Only a small portion of contributions remain within the State of Tennessee. A significant portion of contributions are disbursed outside the United States. For the Budget Year 1993-1994, SBC had total budget receipts of $270,695,300. Of this amount, only 2.86% stayed within the State of Tennessee. 58.91% of total receipts was disbursed to the Foreign Mission Board which in turn disbursed most of these proceeds to sites outside of the United States.

Amicus curiae **National Association of Evangelicals ("NAE")** is a nonprofit association of evangelical Christian

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1/ Many IUGM missions also use camps belonging to others which they rent for below-market rates. Charleston (West Virginia) Urban Youth Ministries brings over 100 children from the housing projects of downtown Charleston to a church camp in Ohio that provides facilities at low cost. If the Ohio camp were faced with loss of property tax exemption for providing this benefit, it might well withdraw this opportunity and make it more difficult or impossible for children to leave the city for a week on a lake in the country.

denominations, churches, organizations, institutions and individuals. It includes 49 member denominations,[2/] some 50,000 churches and 200 parachurch ministries and schools. It represents a broad range of theological traditions grounded in the biblically-based NAE seven-point Statement of Faith. There are 12 NAE camps and many other churches, ministries and other organizations in Maine who are directly affected by the statute at issue in this case.

Virtually all of the NAE's member organizations around the country will be threatened if this Court does not reverse the ruling below. The various member denominations, camps, retreat centers, educational institutions, charities and relief organizations serve large numbers of people who live in other states and countries. One member, Christian Camping International/USA ("CCI"), has over 900 member camps, conferences and retreat centers in 47 states and the District of Columbia. A ruling permitting states to deny tax exemption to nonprofits who do not serve mostly in-state residents would jeopardize all of these critical ministries. Indeed, such a ruling would strike at the heart of the religious mission of NAE's members: to reach as many people as possible, wherever they may live, with the word of God.

Amicus curiae **Evangelical Council for Financial Accountability ("ECFA")**, founded in 1979, is a nonprofit association of 835 evangelical, nonprofit organizations requiring the highest standards of financial integrity and

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2/ Some of the member denominations of NAE are the Assemblies of God, the Baptist General Conference, the Conservative Baptist Association of America, the Evangelical Free Church of America, the Evangelical Mennonite Church, the Evangelical Methodist Church, the Evangelical Presbyterian Church, the Free Methodist Church of North America, the General Association of General Baptists, the Presbyterian Church in America, the Reformed Presbyterian Church of North America and the Salvation Army (National Headquarters).

Christian ethics. ECFA provides guidelines for the preparation and maintenance of accounting and financial statements to religious and charitable organizations to ensure the highest level of integrity and professionalism in Christian stewardship. ECFA also accredits those evangelical organizations that can demonstrate their compliance with these standards. Members of ECFA include Compassion International, Navigators, World Vision and Focus on the Family.

A majority of ECFA's 835 members would be affected by laws like Maine's since most are national or international in their outreach. As a matter of religious doctrine, these organizations seek to assist anyone in need regardless of geographic boundaries. Often it is those people outside a state or outside the U.S. who need the most help. The threat of a loss of tax exemption would put a barrier in the way of these ministries; it would not result in more food and medical supplies dispensed "in-state."

Amicus curiae **Christian Legal Society ("CLS")**, founded in 1961, is a nonprofit, tax exempt professional association of over 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the **Center for Law and Religious Freedom**, has advocated the protection of religious liberty in state and federal courts throughout the nation. The CLS Center has filed briefs *amicus curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before this Court involving church-state relations since 1980. CLS has joined this brief because of its interest in protecting religious organizations from the kind of discriminatory treatment embodied by the Maine statute at issue. If the statute were allowed to stand, churches, Bible camps, religious schools, colleges and universities, and any number of other ministries would be penalized with loss of tax exemption for, in effect, practicing their religion by ministering to people across state lines.

SUMMARY OF ARGUMENT

I. The Maine statute at issue denies a generally available tax exemption to nonprofit charitable and religious organizations who serve a population "principally" of nonresidents of Maine.[y] Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1)(1964 & Supp. 1994) (hereinafter referred to as "Section 652"). Religious nonprofits serve many people across state and national borders, often in far greater numbers than those served within the nonprofit's home state. If this Court permits states to deny tax exemption on the basis of the residence of the "consumer," many of the nation's religious and charitable organizations could lose tax exemption.

The relationship between a religious group and its adherents across a state line is not merely that of a business and a customer; it has deep religious significance and is often part and parcel of the practice of religion. This is obvious where the nonprofit is a religious denomination with a national or worldwide constituency, such as *amicus* Southern Baptist Convention, but it is equally true where the nonprofit is a religious charity like *amicus* World Relief (which provides assistance to the poor in the Third World), a religious camp such as those represented by *amicus* NAE or a religious college or university such as those represented by *amicus* CCCU. In each case, the cross-border "transactions" are acts of religious free exercise accorded the protection of the Religion Clauses of the First Amendment and the Religious Freedom Restoration Act. Section 652 is in conflict with the Free Exercise rights of religious nonprofits and their constituents because it penalizes the exercise of

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[y] The statute applies to nonprofits who charge fees to out-of-state consumers or beneficiaries in excess of $30.00 per week. Section 652's only exception covers corporations organized "for the sole purpose of conducting medical research." Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1)(1964 & Supp. 1994).

religion across state lines. Section 652 also risks violating the Establishment Clause because a scheme of property taxation for religious bodies requires a level of entanglement in the affairs of religious bodies that this Court consistently has prohibited.

In addition, *amici* and their members would face staggering costs and corresponding reductions in services if states were permitted to adopt statutes like Maine's. Virtually all *amici* receive some form of state and local tax exemption, especially real property tax exemption. For *amici* and their members, this exemption is critical to their ability to continue their works of charity, education and ministry. If Section 652 is permitted to stand, even religious denominations could face the prospect of loss of tax exemption and severe financial hardship.

II. The Commerce Clause was adopted to ensure a national free market and to prevent states from placing barriers in the way of interstate commerce. Indeed, the economic hardships endured under the Articles of Confederation were attributed to the absence of free interstate trade, the need for which was the principle reason for convening the Constitutional Convention. Economic unity was seen as necessary to national unity and prosperity. From the landmark case of *Gibbons v. Ogden* onward, this Court consistently has applied the Commerce Clause to strike down state legislation which placed undue burdens on the stream of commerce.

Section 652 is in patent derogation of the Commerce Clause. It expressly penalizes nonprofits who deal with residents of other states by revoking their property tax exemption, and thereby penalizes residents of other states whose transactions with Maine nonprofits must bear the costs of the resulting taxation. The legislative history of Section 652 is unequivocal: legislators intended to raise revenue at the expense of non-residents, or at the expense of entities that were perceived to serve non-residents.

Section 652 discriminates against sellers who transact with non-residents instead of residents. Section 652 discriminates against consumers who are non-residents, rather than residents. Indeed, by discriminating against a seller's *choice* to serve non-residents, Section 652 discriminates against interstate commerce itself, and is thus *per se* invalid. The statute does not fulfill any non-discriminatory purpose that could not just as easily be served by a non-discriminatory statute. Even under a "flexible approach," Section 652 must fall. The substantial burdens it places on interstate commerce are not necessary to obtain the asserted local benefit of increased tax revenues. Tax revenues can be increased by any number of less burdensome means.

The Court should reverse the judgment of the Supreme Judicial Court of Maine.

ARGUMENT

I. THE SUPREME JUDICIAL COURT'S RULING THREATENS RELIGIOUS, CHARITABLE AND EDUCATIONAL INSTITUTIONS THROUGHOUT THE COUNTRY.

Religious and charitable organizations are vital to the life of this nation. They provide food to the hungry, shelter to the homeless, comfort to the grieving and hope for the faithful. Religious recreational institutions, such as the petitioner, provide not only rest and relaxation, but religious instruction and spiritual rejuvenation as well. Private educational institutions serve hundreds of thousands of our citizens, many of whom choose colleges and universities associated with religious denominations or religious ministries. In short, even putting aside the illegality of legislation aimed at this cherished resource, any threat to the survival of our religious and charitable organizations must be seen as a threat to the quality of life we have enjoyed for over two centuries:

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-

> Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970).

A. Removal Of Tax Exemption For Religious Charities Would Raise Serious Religious Liberty Conflicts, Igniting Costly Litigation And Divisive Competition.

Amici are all religious charities and other religious groups who seek to exercise their right to religious liberty under the First and Fourteenth Amendments. Religious liberty is not limited to the silent, subjective belief of an individual or group. *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). It also encompasses the practice of religion and the right of people and groups to communicate and associate for the purpose of practicing their religion. *Yoder*, 406 U.S. at 215, 220; *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). Tax exemption for religious groups provides an important protection against undue entanglement between the government and religion, fulfilling the requirements of the Establishment Clause. Tax exemption also shields religion from undue interference or burden by government, affording religious groups the protections guaranteed by the Free Exercise Clause and the Religious Freedom Restoration Act.[4] The denial of tax exemption on the grounds that a church or other religious institution serves adherents who happen to live across state lines thus presents a serious conflict with this Court's longstanding precedents defending the right to religious liberty.

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[4] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb *et seq.*).

This Court examined the question of tax exemption for religious bodies in depth in *Walz*, where the Court found that tax exemption for religious bodies does not constitute a violation of the Establishment Clause:

> Nothing in [our] national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief.

Walz, 397 U.S. at 678. Thus, a statute granting tax exemption to religious bodies is not an attempt to establish religion, "it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." *Id.* at 673.

Indeed, as the Court observed, real estate *taxation* of religious bodies heightens the risk of excessive government entanglement in violation of the Establishment Clause:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> * * * * *
>
> [E]xemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Id. at 674, 676.

As anticipated in *Walz*, Section 652 creates the risk of significant entanglement between religious bodies and the government, raising serious Establishment Clause conflicts.

Newly taxable church properties are now subject to "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Walz*, 397 U.S. at 674. Indeed, the Maine statute presents an added danger, for religious groups can legitimately fear that the state will enforce the statute by investigating the membership (or the recipients of benefits) of exempt entities, a level of interference that this Court has long condemned. *E.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

In *Walz*, this Court did not reach the issue of whether denial of tax exemption would constitute a *per se* violation of the Free Exercise Clause, although Justice Brennan (concurring) explicitly recognized that possibility. *See* 397 U.S. at 692 n.12. The Court need not reach so broad an issue here, for Section 652 does more than revoke tax exemption; it revokes tax exemption in a manner that discriminates directly against the free exercise of religion. By denying tax exemption on the basis of the residency of the individual served by an exempt entity, the statute severely penalizes religious organizations for ministering to American citizens who have beliefs, rather than geography, in common. Likewise, the statute substantially burdens the rights of out-of-state adherents to freely attend, support or receive charity from their church or religious organization because to do so would constitute a threat to the economic survival of their faith group.

The government simply cannot deny a generally available benefit, such as tax exemption for nonprofits, as a penalty for the exercise of the fundamental right to freely associate for religious purposes. As this Court held in *Murdock*:

> Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse.

319 U.S. at 112. *See also Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981).[5/]

The right sought by Maine to discriminate in taxation carries with it the inherent danger of creating substantial burdens to the exercise of religion not only for the groups and individuals represented by *amici*, but also for the institutions and adherents of virtually every faith group. These burdens cannot be justified. *Thomas*, 450 U.S. at 719; *Murdock*, 319 U.S. at 112; 42 U.S.C. § 2000bb-1(a).

This case reaches the Court under the Commerce Clause but, as demonstrated above, Section 652 burdens not merely interstate transactions, but interstate transactions of special significance to which this Court has always accorded added protection. Maine does more than burden interstate commerce; it burdens the rights of American citizens to associate across state boundaries in the common practice of their religion. No set of state interests can justify so dramatic an infringement of basic liberties.

B. Tax Exemption Is Essential To The Survival Of Religious And Charitable Not-For-Profit Institutions.

The vast majority of religious and charitable institutions in the United States receive some kind of state tax exemp-

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[5/] "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 717-18.

tion.[6] *See Walz*, 397 U.S. at 676 ("All of the 50 States provide for tax exemption of places of worship * * *"). Tax exemption is critical to their survival for, by definition, these organizations are "nonprofit" and do not exist for the purpose of amassing wealth. Rather, they exist to serve the public interest, through public charity, for the good of all.

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[6] *See* Ala. Code § 40-8-1; Alaska Const. art. IX, § 4; Alaska Stat. § 29.45.030; Ariz. Rev. Stat. § 42-271; Ark. Rev. Stat. § 26-3-301; Cal. Const. art. XIII; Cal. Rev. & Tax Code § 214; Colo. Rev. Stat. § 39-3-101; Conn. Gen. Stat. § 12-81; Del. Rev. Stat. tit. 9, § 8104; D.C. Code Ann. § 47-1002; Fla. Stat. Ann. § 196.196; Ga. Code § 48-5-41; Haw. Rev. Code § 246-32; Idaho Code § 63-105B; 35 ILCS 200/15-40; Ind. Code Ann. § 6-1.1-10-16; Iowa Code Ann. § 427.1; Kan. Stat. Ann. § 79-201; Ky. Const. § 170; La. Const. art. VII, § 21; La. Rev. Stat. Ann. § 47:1708; Me. Rev. Stat. Ann. tit. 36, § 652; Md. Code Ann. tit. 7, § 7-202; Mass. Gen. Laws ch. 59, § 5; Mich. Comp. Laws Ann. § 211.7; Minn. Stat. § 272.02; Miss. Code Ann. §§ 27-31-1 to 23; Mo. Rev. Stat. Ann. § 137.100; Mont. Code Ann. §§ 15-6-201 to 209; Neb. Rev. Stat. § 77-202; Nev. Rev. Stat. §§ 361.125, 361.135, 361.140; N.H. Rev. Stat. Ann. § 72:23; N.J. Stat. Ann. § 54:4-3.6; N.M. Const. art. VIII, § 3; N.Y. Real Prop. Tax Law § 420-a; N.C. Gen. Stat. §§ 105-275 to 278; N.D. Rev. Stat. Ann. § 57-02-08; Ohio Rev. Code Ann. §§ 5709.04 to .17; Okla. Stat. Ann. tit. 28, § 2887; Or. Rev. Stat. §§ 307.130, 307.136, 307.140; 72 Pa. Cons. Stat. Ann. § 5020-201; R.I. Gen. Laws § 44-3-3; S.C. Code Ann. § 12-37-220; S.D. Codified Laws Ann. § 10-4-9 to 9.3; Tenn. Code Ann. § 67-5-212; Tex. Rev. Tax Code Ann. §§ 11.18 to 11.21; Utah Const. art. XIII, § 2; Vt. Stat. Ann. tit. 32, § 3802; Va. Code §§ 58.1-3607, 58.1-3608, 58.1-3650.1 to 3650.642; Wash. Rev. Code Ann. §§ 84.36.020, 84.36.030, 84.36.047, 84.36.060; W. Va. Code § 11-3-9; Wis. Stat. Ann. § 70.11; Wyo. Stat. Ann. § 39-1-201. No state besides Maine withholds real property tax exemptions from charities and religious groups who serve non-residents.

Thus, for most nonprofits, tax exemption of one sort or another is not only a benefit, it is a necessity. If most charities had to pay real estate or income taxes they would have to severely curtail, if not discontinue, their services. Thus, the ironic result of state taxation of these entities would not be to raise revenue, but to drive them out, depriving all of the people served (regardless of where they live) of the benefits or services that the charity provides and of the jobs they provide to the local economy. This may mean closing an international food relief operation or a university. It may mean closing a Bible camp or a retreat house. In any case, the harm is palpable. As Justice Brennan observed, concurring in *Walz*:

> Taxation * * * would bear unequally on different churches, having its most disruptive effect on those with the least ability to meet the annual levies assessed against them. And taxation would surely influence the allocation of church resources. By diverting funds otherwise available for religious or public service purposes to the support of the Government, taxation would necessarily affect the extent of church support for the enterprises that they now promote. In many instances, the public service activities would bear the brunt of the reallocation, as churches looked first to maintain their places and programs of worship. In short, the cessation of exemptions would have a significant impact on religious organizations.

Id. at 692.

Amici would all suffer if states were permitted to withdraw tax exemption for charities serving non-residents.

Amicus CCCU represents over 90 academic institutions in over 30 states, accounting for over 150,000 students. All of these institutions are exempt from state property and income taxes. All would be jeopardized (as would the right

of their students to attend the religious institution of their choice) by any loss of tax exemption.

For example, CCCU member Houghton College, a Christian college in Houghton, New York with over 1,400 students, is affiliated with the Wesleyan Church. The school's over 1,100 acres in upstate New York currently is exempt from real property taxes. However, if the school were forced to pay taxes on the campus property, its tax bill would be approximately $3.2 million. Houghton would be required to raise fees at least 15%, resulting in a vicious cycle of fewer students, less revenue, fewer employees and diminished denomination-member participation. Ultimately, the school could be faced with property sale, closure, merger or an extraordinary financial bail-out, any of which would result in crippling the school.[7/]

In addition, there are over 1,000 camps and retreat centers represented by *amicus* NAE, all of which are tax exempt organizations. One of NAE's largest member organizations is Christian Camping International/USA. Founded in 1963, CCI is an association of over 900 camps and retreat centers with over 5,000 full-time staff and 100,000 summer staff. CCI members serve over 5 million people annually from over 176,600 churches, totaling over 15 million camper days per year. CCI members have approximately 22,200 buildings, covering an estimated 221,200 acres (approximately 346 square miles) for Christian camping use. CCI has estimated that its camp membership

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7/ For some denominations, closure of their affiliated school would offer no alternatives within which to learn the tenets of their particular religious tradition. For example, North Park College in Chicago, Illinois is the only college or university in the country affiliated with the Evangelical Covenant Church. Likewise, Trinity International University in Deerfield, Illinois is the only college or university affiliated with the Evangelical Free Church of America.

would be faced with a total annual tax bill of close to $22 million if all were to lose their property tax exemption.

Importantly, the camps in the NAE and CCI are not just sports camps. They are also places of Bible instruction, prayer and worship. They serve an avowedly religious function not for the benefit of the institution, but for the benefit of the people who come from everywhere to join in a common religious experience. A loss of tax exemption, especially property tax exemption (camps typically own large tracts of land) would be devastating to organizations which barely can afford to operate now.[8/]

C. Many Charities And Religious Groups Serve Significant Numbers Of Out-of-State Citizens And Would Be Threatened By State Statutes Penalizing Interstate And International Ministry.

The very purpose of a religious camp or retreat center is to attract people from all over to share a common religious experience in a place removed from their everyday lives. Thus, by definition, a camp will serve a large proportion of people who are residents of other states or countries. As pointed out in the petition (at 2), 95% of the people served by the petitioner in this case crossed state lines to attend.

The same is true for colleges and universities. Among the 90 members of *amicus* CCCU, many of the students come from other states or countries. These students seek out the institution of their choice for both academic and religious

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8/ Indeed, many camps lose money, and are supported by other church institutions. This support is not without limits, and often would not cover the cost of property taxes. Moreover, this support frequently comes from a religious denomination or national support organization. If the camping constituency were limited to in-state participants, the out-of-state supporters that financially make up the operating deficit would be discouraged from giving to a camp that they would be discouraged from attending.

reasons. For example, Wheaton College, an independent evangelical college in Wheaton, Illinois, draws from all 50 states and 51 countries. Of its 2,650 students, over 75% come from outside Illinois. Wheaton College's 80-plus acres and 1,450,000 square feet of buildings would face a staggering property tax bill if the college lost tax exemption.[9/]

For Christian colleges and universities, a nationally-diverse student body is not only a theological and practical goal, but is in fact the norm. Gordon College, an independent evangelical college in Wenham, Massachusetts, draws 66% of its 1,200 students from 27 countries and 39 states other than Massachusetts. Taylor University, an evangelical school with campuses in Upland, Indiana and Fort Wayne, Indiana, draws 65% of its 1,892 total student body from the 49 states other than Indiana and from the District of Columbia. Anderson University, affiliated with the Church of God in Anderson, Indiana, draws 45% of its 2,245 students from 48 states other than Indiana and from 15 foreign countries. Nyack College, a Christian & Missionary Alliance college in Nyack, New York, draws 44% of its 1,100 students from outside New York, including 33 states and 23 countries. Houghton College, mentioned above, draws 38% of its 1,356 students from 20 countries and 34 states other than New York. George Fox College, with 1,650 students in Newberg, Oregon, is affiliated with the Evangelical Friends International of North America (Quaker) and draws 32% of its students from 12 countries and 30 states other than Oregon.

Tax exemptions are also critical to religious and charitable social service organizations. The social service organizations of *amicus* NAE, such as the Salvation Army, serve approximately 20 million people. These organizations operate soup kitchens, shelters, counseling services and other

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[9/] As the petitioner notes, even Maine's most prominent institutions of higher learning draw almost 90% of their students from out of state. *See* Pet. 14 n.32.

ministries to the poor. In many urban locations, the metropolitan area of a city will encompass two or more states.[10/] A charity operating in "the City" may serve people from many states.[11/] These operations would be threatened by statutes like Maine's. They would either have to demand identification and reject the non-resident poor, an alternative which is inimical to their religious beliefs and virtually impossible to enforce, or they will have to move to locations where the poor of other states cannot reach them.

International aid agencies would likewise suffer if other states were permitted to follow Maine's example. For example, NAE member Compassion International, a major international relief ministry headquartered in Colorado Springs, Colorado, sends 99% of its funds overseas in some form of financial assistance or aid. A revocation in Compassion's property tax exemption for its headquarters would result in a several hundred thousand dollar expense and a severe cutback in support to needy children overseas. Likewise, World Vision, an evangelical relief agency headquartered in the State of Washington, sends 99% of its assistance to people outside the United States. World Vision would be forced to limit the funds sent to needy children worldwide if forced to pay the estimated $70,000 per year it would owe in property taxes.

Amicus World Relief is an international relief agency for the poor of the Third World. World Relief is headquartered

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[10/] For example, the New York area consists of New York, Connecticut and New Jersey. The Philadelphia area consists of Pennsylvania, Delaware and New Jersey. Even the District of Columbia metropolitan area consists of the District, Maryland and Virginia.

[11/] Gospel Mission, a religiously-affiliated drug treatment center for homeless men in Washington, D.C. has been nationally recognized as a private-sector success story. Gospel Mission routinely helps men from outside the District, and even outside the D.C. metropolitan area.

in Illinois, where it has exemption from state and local taxation. It raises funds from evangelical churches around the country, and ministers to the poor overseas by sending funds, medical supplies and other resources. Last year, World Relief raised over $24 million for relief and refugee projects, of which $934,367 was raised by donors in Illinois. However, only $5,634,00 of the budget was spent for refugee assistance and relocation in Illinois; $10,250,968 was sent to 13 other states for resettlement activities. Moreover, another $6,245,252 was sent directly overseas for relief and development activities in 22 foreign countries. If the Maine regime is upheld, Illinois could presumably revoke tax exemption for World Relief simply because the charity was not serving primarily Illinois residents.

Other major U.S. ministries would suffer as well. NAE member Focus on the Family, an international family-support and assistance ministry headquartered in Colorado, receives donations from and is active in all 50 states and 15 foreign countries. Prison Fellowship, an evangelical support ministry for prisoners and their families based in Virginia, is involved in all 50 states and spends 90% of its funds outside Virginia. The obligation to pay an estimated $60,000 in property taxes would curb the important religious and social services provided to inmates and their families.

If this Court upholds Maine's statute, and other states are permitted to enact similar statutes, even religious denominations may lose their state and local tax exemptions. The NAE member denominations all have tax exemptions in their respective states and localities. Yet, each serves a population far broader than the citizenry of its home state. Some of the member denominations are worldwide. A statute denying tax exemption for service beyond the state's border not only would harm such denominations, but would also infringe on their rights to freely exercise their religion, in that tax benefits would be lost as a result of religious

activities with anyone outside of the state.[12/] States simply do not have the power to inflict such a penalty on activities like overseas food relief, missionary activity or Bible teaching. *See supra*, pp. 10-13.

As this Court has held:

> [t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint. For * * * "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

Follett v. McCormick, 321 U.S. 573, 577 (1944) (citations omitted).

II. MAINE'S STATUTE VIOLATES THE COMMERCE CLAUSE BECAUSE IT IMPERMISSIBLY DISCRIMINATES AGAINST IN-STATE ENTITIES AND OUT-OF-STATE CITIZENS ENGAGED IN INTERSTATE COMMERCE.

A. The Purpose Of The Commerce Clause Was To Create A National Free Market In Which States Could Not Discriminate Against Interstate Commerce.

Under the Articles of Confederation, the United States experienced a post-war economic depression in the 1780s. 3 William W. Crosskey & William Jeffrey, Jr., *Politics and the Constitution in the History of the United States* 165-66 (1980). *See also United States v. The William*, 28 Fed. Cas. 614 no. 16700 (D. Mass. 1808)("It is well understood that the depressed state of American commerce, and the complete experience of the inefficacy of state regulations, to apply a remedy, were among the great, procuring causes of

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12/ Even a church located in a downtown area could lose tax exemption if its members were drawn mainly from a suburb that happened to be in another state.

the federal constitution"). The lack of centralized regulation of commerce among the former colonies exacerbated the economic situation because each state passed measures and countermeasures designed for economic self-protection, aggression or retaliation. 3 Crosskey & Jeffery, *supra*, at 165-66. This resulted in economic Balkanization of the new states:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended until they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Federalist No. 22 (Hamilton) (C. Rossiter ed. 1961). *See also* James Madison, *Debates in the Federal Convention of 1787* (Aug. 29, 1787), at 632 (quoting Mr. Pinkney, "States pursue their interests with less scruples than individuals").

Popular sentiment in favor of a stronger and more enforceable national power over commerce was expressed in several former colonies. For example, in Massachusetts in 1789, a group of Boston merchants and tradesmen met to urge the Massachusetts legislature to give Congress full powers to regulate the internal as well as external commerce of all of the States, to "reach the mischiefs we complain of." 3 Crosskey & Jeffrey, *supra*, at 172. In New York, the Chamber of Commerce presented the New York legislature two memorials which urged that the "sole" power of regulating the commerce of the United States be granted to Congress. *Id.* at 166. In the same year, a committee from Philadelphia sent a memorial to the Pennsylvania legislature complaining that a fundamental defect in the Articles of Confederation was that Congress had not been given "a full and entire power over the commerce of the United States,"

and that for want of such a power the whole country was in "a very singular and disadvantageous situation," and the "intercours[e] of the States [was] liable to be perplexed and injured by various and discordant regulations instead of that harmony of measures on which the particular as well as the general interests depend." *Id.* at 167 & n.9.

Dissatisfaction with the inadequate power of the federal government on economic and other fronts led to the Constitutional Debates in 1787 and the eventual drafting and passage of the present Constitution. *Federalist No. 42* (Madison) (C. Rossiter ed. 1961) ("[a] very material object of this [commerce] power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter").

Contemporary records reveal the central importance the Framers placed on preventing the Union from becoming a fragmented, hostile and competitive grouping of miniature economies that would inevitably sever themselves from each other. As Madison put it:

> I conceive it to be of great importance that the defects of the [present] federal system should be amended, not only because such amendments will make it better answer the purpose for which it was instituted, but because I apprehend danger to its very existence from a continuance of defects which expose a part if not the whole of the empire to severe distress.

Letter from James Madison to James Monroe, Aug. 7, 1785, *Papers* 8:333-36. The Framers were convinced that the most effective way to prevent economic chaos was to grant primary power over commerce to the national government so that local political forces could not impose unequal burdens on interstate transactions. To that end the Framers adopted, among other things, the Commerce Clause. 4 *Letters and Other Writings of James Madison* 15 (1865) (power had been granted Congress by the Constitution over interstate com-

merce mainly as a "negative and preventative provision against injustice among the States").

Since the early days of the republic, this Court has construed the Commerce Clause to limit the power of individual states to economically burden the national free market by discriminatory treatment of any phase of interstate commerce, whether in an effort to help the local economy or cure a local problem. *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 11 (1824) (power of Congress under the Commerce Clause extends to matters that take place intrastate); *Guy v. Baltimore*, 100 U.S. 434, 439-40 (1879) (no state may impose a more onerous burden or tax on the products or persons of other states, than it has on its own products or citizens); *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891) (states cannot deprive persons of their right to carry on interstate commerce); *St. Louis & E. St. L. Elec. R.R. v. Missouri*, 256 U.S. 314, 318 (1921)(state may not, in the guise of taxation of real property, compel a corporation to pay for the privilege of engaging in interstate commerce); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (state cannot impose tax which discriminates by providing advantages to local enterprises); *West Lynn Creamery, Inc. v. Healey*, 114 S. Ct. 2205, 2216 (1994) (state imposition of differential burden on any part of or party to the stream of commerce is invalid).

As shown below, Section 652 is in stark derogation of the Framers' intent to prevent economic Balkanization.

B. The Statutory Language And Legislative History Of Section 652 Betray Its Discriminatory Purpose And Effect.

Section 652 provides that property tax exemptions otherwise available to "benevolent and charitable" institutions will be denied to any such institution "that is in fact conducted or operated *principally for the benefit of persons who are not residents of Maine*." Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1)(1964 & Supp. 1994)(emphasis added).

If it were not already apparent from the statute itself, Section 652's legislative history establishes conclusively that the purpose of the statute was to alleviate local problems at the expense of interstate commerce. As one Maine legislator said:

> I can tell you the reasons for the bill. * * * [T]his particular bill * * * is for those institutions that are set up within the State of Maine by out-of-state people for out-of-state people. That is the main goal of this particular bill.

Pet. App. 24a-25a. As another legislator explained, "*I don't believe that this will affect any business that is in the State run by anybody that is in this State.*" *Id.* at 28a (emphasis added). One lone legislator argued:

> Personally, it seems to me that where we are a vacation state and you are saying here that if it is conducted for the benefit of persons who are not residents of Maine, *it is discriminating against the people who come to our state*.

Id. at 22a (emphasis added).

Section 652 penalizes tax exempt entities that choose to enter the stream of interstate commerce; it impedes the access of nonresidents to camping within the state. The trial court found that Section 652 confers an economic advantage on institutions that serve primarily in-state residents and confers a comparable economic disadvantage on institutions that serve primarily out-of-state residents. Pet. App. 15a, 17a. It also found two other significant facts: that in the case of the petitioner camp, the increased costs incurred by reason of Section 652 would be passed along to out-of-state campers, and that this increase in costs would impede interstate travel by campers by effectively preventing them from attending the camp. This compels the conclusion that the statute creates a direct burden on commerce and is thus invalid.

C. Section 652 Is Per Se Invalid.

Both discriminatory tax exemptions and discriminatory taxes impermissibly burden interstate commerce. *West Lynn Creamery*, 114 S. Ct. at 2220 (Scalia, J., concurring); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984)(tax exemption for local products violates Commerce Clause when not applicable to local sales of out-of-state products); *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 125 (1908)(property tax exemption favoring local businesses violates Commerce Clause). A taxation scheme impermissibly discriminates when it treats in-state and out-of-state economic interests in a manner which benefits the in-state interests and burdens the out-of-state interests. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1350 (1994); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("[e]conomic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States"). The protective scope of the Commerce Clause encompasses all phases of a commercial transaction and all parties involved, whether sellers or consumers. *Oregon Waste*, 114 S. Ct. at 1350; *West Lynn Creamery*, 114 S. Ct. at 2216; *Bacchus*, 468 U.S. at 269.

The plain language of Section 652's exemption scheme discriminates against "sellers" (*e.g.*, universities or camps) who transact interstate business and, ultimately, against their out-of-state "customers" (*e.g.*, students or campers), solely because of the geography of their transactions and the residence of the consumers. By penalizing charities who serve out-of-state residents, Maine in effect taxes interstate commerce itself. The state also places a burden on non-residents who must now pay more for the "privilege" of travelling to Maine for an education, to worship or to receive

charity from a Maine organization.[13] If all states adopted similar statutes, religious, charitable and educational institutions would become parochial, as they and their beneficiaries could no longer afford to venture beyond the state line.

This Court repeatedly has struck down such facially discriminatory protectionist measures as *per se* invalid under the Commerce Clause. *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996); *Oregon Waste*, 114 S. Ct. at 1358; *Bacchus*, 468 U.S. at 270-71 (where legislative history showed tax exemption scheme intended to favor local interests, a flexible approach to analysis of scheme inappropriate). Such a facially discriminatory tax will be upheld only where, under the strictest scrutiny, a state can prove that the facially discriminatory tax is designed to further a legitimate local purpose that cannot be served by a non-discriminatory alternative. *Oregon Waste*, 114 S. Ct. at 1351.

Here, that is not possible. Maine cannot present any non-discriminatory purpose for Section 652; its sole purpose is to increase revenue by taxing only transactions with out-of-state consumers. Nor has Maine demonstrated that no non-discriminatory means are available to supplement local government revenues. Indeed, Maine could just as easily have decided to raise property taxes across the board, to

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[13] Commerce Clause protection extends to the right of interstate travel for commercial and recreational purposes. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-56 (1964); *Edwards v. California*, 314 U.S. 160, 171 (1941). Indeed, the right of interstate travel for any legal purpose whatsoever is recognized as a fundamental right which is protected by the Constitution. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 380 (1979). This right is especially precious to *amici*, whose constituents travel to or associate with them in pursuit of their free exercise of religion. *See supra*, pp. 17-21.

remove all exemptions for not-for-profit entities[14/] or to adopt some other independent, but non-discriminatory tax.

D. The Supreme Judicial Court's Analysis Was Flawed.

Despite the unambiguous, discriminatory language of Section 652, the blatant legislative goal of attempting to cure local income problems at the expense of out-of-state consumers so clearly articulated in the statute's legislative history, and the Supreme Judicial Court's own acknowledgement that Section 652 would increase costs to out-of-state campers, the court held that Section 652 had a no more than an "incidental" effect on interstate commerce and regulated "even-handedly." Pet. App. 6a. Consequently, the court below concluded that Section 652 did not impermissibly burden interstate commerce in violation of the Commerce Clause. *Id.* at 6a-7a.

This judgment effectively subordinates interstate commerce to local revenue generation. Consequently, it must be overturned. The Commerce Clause protects consumers and their service providers, as well as out-of-state businesses. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982) (a state may not give its residents preferred right of access over out-of-state consumers, to natural resources of state). Thus, a state may not burden movement across state lines or the right of sellers and consumers to engage in interstate transactions.

The Maine Supreme Judicial Court held that Section 652 does not favor in-state interests because it does not increase the cost of doing business for out-of-state camps or cause out-of-state camps to leave the market, and because charitable institutions can qualify for an exemption by "choosing to dispense the majority of their charity locally." Pet. App.

[14/] An alternative we do not favor and which raises concerns under the First Amendment's Religion Clauses, but which at least would not implicate the Commerce Clause.

6a. This reasoning fails because it completely ignores the burdens imposed by the statute on interstate *consumers*. These burdens are no more valid under the Commerce Clause than burdens on out-of-state businesses. The net effect of Section 652 is, as recognized by the Maine Supreme Judicial Court, to increase the costs to (and thus to discriminate against) all out-of-state consumers of services provided by Maine's not-for-profit organizations.

Even more absurd is the Maine court's statement that Section 652 is even-handed and non-discriminatory simply because the petitioner can qualify for an exemption by choosing to serve Maine residents. Pet. App. 6a. This merely demonstrates how severely the statute discriminates. First, it acknowledges an economic penalty for engaging in interstate commerce. Second, it ignores the burden on citizens of other states who wish to cross the Maine border to purchase a service; a right accorded the same protection as the right to cross state lines to make a sale.[15/] A tax which prevents either of these from occurring is facially discriminatory. The court below thus erred in not applying the *per se* rule of invalidity.

E. Section 652 Is Invalid Even Under A Flexible Approach.

Even under the flexible analysis advocated by the Supreme Judicial Court, Section 652 is invalid.[16/] *West*

[15/] Of course, for *amici*, this right is also the right to cross state borders to worship in common or to give or receive charity.

[16/] The flexible approach is not available to Maine in this case because it has failed to advance other legislative objectives and because the statute does not regulate even-handedly. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 343 n.5 (1992); *Brown-Forman*, 476 U.S. at 579. As previously discussed, Section 652 patently discriminates against interstate commerce and the only legislative objective

(continued...)

Lynn Creamery, 114 S. Ct. at 2216 (Commerce Clause prohibits forthright or ingenious discrimination; statute will be invalid when its practical operation discriminates against interstate commerce); *Brown-Forman*, 476 U.S. at 580 (state must demonstrate that its interest is legitimate and that the burden on interstate commerce does not exceed local benefits). Here, the Maine legislature did not consider any alternative ways to compensate for revenues lost by granting property tax exemption to charitable entities that serve out-of-state residents. The burden on interstate commerce effected by Section 652 is substantial, not incidental. It penalizes commerce with non-residents. Not only does this increase costs to out-of-state consumers, but it burdens their right to travel to enjoy the resources of other states. Here, this is especially alarming because the purpose of the travel is to join in a religious experience. The purported benefit of Section 652's incremental increase in local revenues cannot justify these burdens. There are any number of permissible ways to increase revenues, or to spread the burden of taxation more broadly. What the state may not do is employ a means that discriminates against transactions in interstate commerce.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be reversed.

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[16](...continued)
articulated for the statute was to gain additional revenue from those who engage in interstate, as opposed to intrastate, transactions.

Respectfully submitted.

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